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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 698.

DANIEL F. BOONE, *Petitioner*,

v.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE and MARTHA PENELOPE BOONE, a Minor represented in this proceeding by her next friend, W. C. Hague.

## BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

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### OPINIONS BELOW.

The trial court wrote no formal opinion, but adopted findings of fact and conclusions of law in making orders and rendering a judgment (See R. 33-40, 49-50).

The opinion of the Supreme Court of the State of North Carolina (R. 127) appears in 222 N. C. 205 (Adv. Sheets), 22 S. E. (2d) 426.

## JURISDICTION.

The jurisdiction of this Court is conferred by Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925. A final judgment was entered November 4, 1942, by the Supreme Court of North Carolina. The writ of certiorari was granted March 8, 1943 (R. 135).

## STATUTE INVOLVED.

The Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, is relied upon by petitioner. Section 100 of the Act reads:

> "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

Section 201 of the Act reads:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person, on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Other pertinent sections of the Soldiers' and Sailors' Civil Relief Act of 1940 are set forth in the Appendix.

## QUESTIONS PRESENTED.

(1) Did the Supreme Court of North Carolina err in sustaining a personal judgment against a member of the armed forces of the United States on active military duty at Washington, D. C., who could not be present in person to defend and who was not represented by counsel at the trial of an action brought against such army officer when such army officer moved for the relief provided him by an act of Congress, the Soldiers' and Sailors' Civil Relief Act of 1940?

(2) May a judgment be rendered against an army officer on active military duty, who claims the relief provided in the Soldiers' and Sailors' Civil Relief Act of 1940, when such officer specifically requests a continuance or stay of proceedings under Section 201 of said Act and makes a showing to the trial court that his ability to conduct his defense has been and is materially affected by his military service, and there is no evidence before the trial court to sustain a finding that the ability of the petitioner to defend is not materially affected by military service?

(3) May a state court summarily brush aside the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and render a judgment against an army officer on active military duty who prays for the relief afforded by said Act?

(4) Was there compliance by the state courts of North Carolina with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and more particularly with Section 201 of said Act?

(5) Was there due process of law in a case wherein (1) an army officer is a defendant and cannot be present in

person because of military service, (2) local counsel for the army officer cannot be present because he has recently entered upon active military service and (3) two important witnesses are outside of the State in military service and the court refuses to grant a continuance?

(6) May a trial court arbitrarily proceed with a trial without appointing an attorney to represent a person in military service who does not personally appear at the trial because he is on active military duty and cannot secure leave and is not represented by his attorney who is also on active military duty?

## STATEMENT OF MATTER INVOLVED.

At all times during the period of this litigation, petitioner has been and now is a member of the armed forces of the United States on active duty and stationed in Washington, D. C.

This action was instituted against petitioner in the Superior Court of Polk County, North Carolina, on June 21, 1941. The purpose of the action was to declare petitioner a trustee of certain funds in his possession and to remove him as trustee in the event he failed to account for said funds (R. 2, 6).

Petitioner set forth his defense to the action in his answer (R. 20-30) to the complaint. In his answer, petitioner stated among other things, that he was on active duty in the armed forces and residing in the District of Columbia (R. 21, 29).

The action came up for hearing on February 2, 1942, in the regular January-February term of the Superior Court of Polk County, North Carolina, at which time, petitioner moved the court for a continuance (R. 41); that the court thereupon transferred this action to the Superior Court of Henderson County, North Carolina, and set the case peremptorily for trial on May 25, 1942 (R. 42).

On May 13, 1942, twelve days before the trial, Major Roy L. Deal, counsel for petitioner, was called to active military duty in the armed forces of the United States (R. 49).

On May 25, 1942, when the Superior Court of Henderson County convened, a written application and motion for a continuance of the action was filed in petitioner's behalf, praying for relief under the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178) and for a continuance of the trial of the action until after the termination of his military service, "or until such time as he can properly conduct his defense" (R. 46).

In support of the application and motion for a continuance or stay of proceeedings, two affidavits were filed—one by petitioner and the other by Major Roy L. Deal, petitioner's local counsel (R. 46-49).

Petitioner's affidavit (R. 46) stated among other things: (1) that he was a Major on active duty in the United States Army, (2) that he had been assigned to and stationed at Washington, D. C., (3) that the volume of work in his office was extremely heavy and that no leaves were being granted, except in cases of serious emergency, (4) that the trial of the action would require the bringing of three witnesses to North Carolina from other states and that two of these were in the United States Army and not stationed in the State of North Carolina, (5) that local counsel for petitioner had entered on active military duty with the Army of the United States twelve days prior to the convening of the court, (6) that it was necessary for petitioner to obtain other local counsel to represent petitioner, and (7) that petitioner's ability to defend was materially affected by reason of his military service (R. 48).

The affidavit of Major Roy L. Deal (R. 49) set forth that (1) he was counsel for petitioner, (2) he was ordered to and entered active military service on May 13, 1942, at Washington, D. C., and (3) it was impossible for him to appear as attorney in the trial of the case, especially since leave was obtainable "only in special emergency."

Despite the fact that petitioner had complied with the order of the trial court of Polk County, North Carolina, entered February 2, 1942 (R. 41) and deposited the securities (which was the subject matter involved in the litigation) with the Clerk of the Superior Court of Henderson County, North Carolina, (R. 46), the trial court summarily and without a hearing or without further evidence before it, denied the application for a continuance of the action (R. 49-50). The trial court completely failed to make any further inquiry or to take any testimony on whether the ability of the petitioner to conduct his defense was not materially affected by reason of his military service.

The trial court merely stated as a conclusion in its findings of fact that petitioner was "deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is exercising his assumed right under the act [Soldiers' and Sailors' Civil Relief Act] referred to above to avoid such determination" (R. 50). The court further, *without any evidence or record before it to sustain the conclusion,* "found" that the motion for a continuance was made after petitioner's refusal "in one or more instances" in other litigation to "appear in the courts of North Carolina." The record does not disclose to what other litigation the court refers, and the court does not say.

This vague and unsupported statement indicates that the trial judge was aware that his conclusion that the defendant's ability to defend the action was not materially affected by his military service lacked and badly needed supporting evidence.

Thereupon, "in the absence of the defendant and of any counsel representing the defendant, the Trial Judge proceeded to a trial of the case" (R. 51).

Among other things, the trial court on May 26, 1942, awarded a money judgment against petitioner in the sum of Nineteen Thousand Six Hundred Seventy-Seven Dollars

and Ninety-Nine Cents ($19,677.99) on which a credit was allowed of Eight Thousand One Hundred Eighty-Seven Dollars and Forty-Three Cents ($8,187.43) and rendered a judgment in the sum of Eleven Thousand Four Hundred Ninety Dollars and Fifty-Six Cents ($11,490.56) (R. 39).

On appeal to the court of last resort, the Supreme Court of the State of North Carolina affirmed the trial court in all respects.

## SUMMARY OF ARGUMENT.

There is no question whatsoever that petitioner is within the purview of persons covered by the Soldiers' and Sailors' Civil Relief Act of 1940 (see section 101(1) of the Act). Furthermore, there is no question that the Superior Court of Henderson County, North Carolina, is covered by the provisions of the Act (see section 101(4)).

The entire case revolves about (1) the relief afforded by the Soldiers' and Sailors' Civil Relief Act of 1940 and the true construction of certain provisions in such Act and (2) even if there were no specific provisions in the Soldiers' and Sailors' Civil Relief Act of 1940 dealing with continuances and stays of proceedings of cases against men in the armed forces that the principles of justice under the due process clause of the Fourteenth Amendment to the Constitution would require that courts give serious consideration in granting continuances in cases affecting men on active duty in the armed forces of the country when such soldier could not personally be present to defend at the time the cause was set for hearing and in light of the further fact that his local counsel was also absent because of active military service. Phase (2) was not presented to the state court with any emphasis in this case.

The legislative purpose of the Act (clearly stated in express words in section 100) was to suspend enforcement of civil liability in certain cases of absence in military service of the United States, in order to permit such persons

to devote their entire energy to the defense needs of the Nation. We must bear in mind that the Act was enacted prior to any declaration of war by or against our country. Today, it is much more necessary for the courts to carry out the express mandate of the Congress.

Section 201 of the Act provides the fundamental basis for the procedure used by petitioner in the lower court in requesting the continuance or stay of proceedings and also is relied upon by the lower court in denying the relief requested.

Petitioner contends that this court as determined in *Norris* v. *Alabama*, 294 U. S. 587, 590 (1935) and cases cited therein should and may review the record in order to determine whether or not there was a basis for the refusal by the state courts to enforce the federal right, privilege, or immunity granted by section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner contends that (1) there is not a scintilla of evidence in the record (not even dehors the record) to support a finding by the state court that petitioner's ability to conduct his defense is not materially affected by reason of his military service; (2) Section 201 of the Soldiers' and Sailors' Civil Relief Act requires a finding by the trial court that the ability of a "defendant to conduct his defense is not materially affected by reason of his military service" to be based on evidence and the burden of proof is on the party submitting such evidence as was so well stated by Judge Delehant in *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) at 743; (3) the lower court if it based its finding on any evidence whatsoever could not reasonably have so found because definitely contrary to fact, and a reading of the record by this Court will prove this; (4) the lower court was arbitrary and capricious in refusing the continuance or stay of proceedings to the petitioner when petitioner was on active military duty and in addition his local counsel was not available because local counsel

had also been called to active duty in the armed forces just twelve days before the cause came up for trial; (5) the policy of Congress in writing the Soldiers' and Sailors' Civil Relief Act is pushed aside by the treatment accorded petitioner by the state courts and if allowed to prevail will undermine the morale of the men fighting on many fronts and more especially those who have been or will be sued in state courts and more particularly the courts of North Carolina.

## ARGUMENT.

### I.

### Purpose of Soldiers' and Sailors' Civil Relief Act of 1940.

Section 100 of the Act clearly states the legislative purpose of the Act.

> "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

The Act is designed to safeguard this army officer from being harassed by litigation while on active duty so that he may have full opportunity to render that full measure of devotion to duty that he is bound by oath to do. Obviously the purpose of the Act is not served when a state court proceeds with a trial against an army officer who is

several hundred miles away and particularly when he has no lawyer present to represent his interests.

> "Such legislation serves the dual purpose of enabling such persons to devote their entire energy to the defense needs of the nation and compensating them in some measure for that devotion. From the earliest times, those wielding the sovereign power have used such dispensations to strengthen the morale of their military forces."[1]

## II.

### State Court Did Not Comply With Section 201 of Soldiers' and Sailors' Civil Relief Act of 1940.

This argument of petitioner revolves about a correct construction and interpretation of Section 201 of the Act. The pertinent part of Secti n 201 reads:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, * * * during the period of such service or within sixty days thereafter * * * shall, on application to it (the court) by such persons or some person on his behalf, be stayed as provided in this Act, unless in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service."

There is no question whatsoever that application on behalf of the petitioner was filed in proper time for the relief accorded by this section to him as a defendant. The section speaks in mandatory language when an application is filed by the person in the armed forces or by someone in his behalf.

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[1] Soldiers' and Sailors' Civil Relief Act of 1940, (1940) 27 Va. L. Rev. 207, "Perhaps the first reference in legal writings to civil relief for soldiers exists in the *Coutume de Beauvaisis* of Beaumanoir (1283) where it was mentioned that such relief was accorded by the King to knights on crusade. See Blair, Breach of Contract Due to War (1920) 20 Col. L. Rev. 435."

The issue is joined on the proper construction of the words:

> "unless, in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service."

**A. No evidence to support state court's finding.**

Section 201 of the Act requires a *judicial* opinion and not the personal opinion of the judge. Before exercising a *judicial* opinion evidence is required. The trial judge could not have exercised any judicial opinion because not a word of evidence was presented which would warrant a finding that the ability of the defendant to conduct his defense was not materially affected by reason of his military service.

This court may and should read the record in order to determine whether there was evidence to sustain a finding by the trial court (R. 50) that the ability of petitioner to conduct his defense was not materially affected by his military service.

We submit that the state court in fact merely noted the section and such is not enough in carrying out the provision of the law.

In *Norris* v. *Alabama*, 294 U. S. 587 (1935) at 590:

> "* * * When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." (citing cases)

All that the lower court had before it in connection with

the question of petitioner's ability to conduct his defense were the affidavits of petitioner (R. 46) and his counsel (R. 49). True, the court also had the complaint (R. 2) and the answer (R. 20-30) filed by petitioner but it cannot be fairly concluded that the court could rule that petitioner had no defense by merely reading the answer and thereupon going the next illogical step and concluding that the ability of petitioner to conduct his defense was not materially affected by reason of his military service.

Yet, this is exactly what the trial court did and the Supreme Court of North Carolina gives its voice of approval to such procedure. The trial court stated "From the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it appears that the defendant did not have a defense." O tempora! O mores! Such legal legerdemain when a trial judge desires to reach a certain conclusion!

The absence of petitioner from the trial, the fact that he had no active counsel in the case, the fact that leave of absence from military duty is an exception (granted in emergency only) and not the rule in time of war and the fact that a personal judgment of over eleven thousand dollars is rendered would make one hesitate to conclude that military service did not materially affect petitioner's ability to defend.

**B. Burden of proof on person objecting to continuance.**

We submit that the burden of proving that no continuance or stay of proceedings should be granted is upon the parties objecting to the continuance.

In *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) plaintiff brought action to recover for injuries and property damage resulting from an automobile accident. Motion of the defendant to stay the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940 was sustained. Judge Delehant analyzes Sections 201 and 204 of the act very

clearly and we quote from his opinion here and elsewhere in this brief. At 45 F. Supp. 743, Judge Delehant states:

> "In this case the defendant has applied for a stay of proceedings. He has, therefore, removed the question of allowing a stay from the field of the court's discretion (if, indeed, it be considered, that circumstances suggesting a stay being available, there is ever any real discretion to deny a stay) and made the allowance of the stay mandatory, 'unless in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service.' That language of the Act appears to the court to impose upon the party resisting the application for stay the burden of satisfying the court of the absence of material impairment by military service of the defendant's ability to defend himself.
>
> "No attempt has been made here towards such a showing; and the court can not readily comprehend how such attempt could ordinarily be successful or the showing made in furtherance thereof persuasive."

In the case at bar no attempt was made by any of the parties to show that petitioner's ability to conduct his defense was not materially affected by his military service because we submit that it was and is factually an impossibility.

Assuming for the sake of the argument that the burden of proof is on petitioner, then we say he has sustained such burden. He asked for leave and was denied leave. Petitioner is assigned to an overworked military unit and leaves are granted in emergency cases only and his affidavit presented to the trial judge shows such fact (R. 47). Not a word of evidence impeaches this affidavit of petitioner.

## III.

### Liberal Interpretation of the Act is Proper.

In *Royster* v. *Lederle*, 128 F. (2d) 197 (C. C. A. 6th, 1942) a writ of mandamus was filed to compel Judge Lederle to vacate and set aside his order of continuance in *Royster* v.

*Ruggerio,* 2 F. R. D. 429 pursuant to Section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner had suffered injuries in an automobile accident and sued "X" prior to his induction into the armed forces. "X" had also been found guilty of reckless driving and was given a probated sentence. Petitioner was willing to proceed with the case and was anxious to limit recovery to the liability insurance policy carried by "X" and petitioner further maintained that "X" had no defense because of his testimony in criminal court and therefore, "X" would not be of material aid to the insurance carrier. The desires of the petitioner were not granted although the court added an additional protection for her benefit in sustaining a continuance.

Judge Hamilton said at 128 F. (2d) 200:

> "The statute in question must be liberally construed to effectuate its purpose. We cannot say, as a matter of law, that Ruggerio's rights would not be affected by proceeding to the trial of the cause in his absence. * * * A party to an action should not be compelled to go to trial in his absence or in the absence of the only witness by whose testimony he can make out his defense, unless it appears that he has been guilty of negligence in failing to attend the trial or procuring the attendance of the witness on whom he relies or in obtaining his testimony by deposition or otherwise. Ruggerio has not been guilty of any negligence in failing to attend the trial, and his insurance carrier likewise has not been guilty of negligence in failing to obtain his attendance at the trial or to take his deposition."

See also *Clark* v. *Mechanics' American Nat. Bank et al.,* 282 Fed. 589 (C. C. A. 8th, 1922).

In *Ilderton* v. *Charleston Consol. R. Co.,* 113 S. C. 91, 101 S. E. 282 (1919), an employer was sued for damages suffered by plaintiff. The motorman for whose negligence the employer was sued was in the armed forces. The court held that the trial court should have granted the defendant's motion for a continuance because the motorman was inter-

ested in the outcome of the suit for the reason that if it were decided adversely to the employer the motorman would be liable over. Furthermore, the motorman was the only witness whereby the employer could defend and the Supreme Court of South Carolina held that a continuance should have been granted.

The *Ilderton* case indicates a true construction and understanding of the relief provided by the Act.

## IV.

### Analysis of Cases Cited by North Carolina Supreme Court on Act.

The North Carolina Supreme Court in its opinion (R. 131) cites several cases in support of its conclusion. We submit that these cases are not in point.

(1) *Pope* v. *United States Fidelity & Guaranty Co.*, .... Ga. App. ...., 20 S. E. (2d) 618 (1942).

In May, 1934, a *judgment* was rendered against Mr. Pope and the U. S. F. & G. became the transferee thereof. In May, 1941, U. S. F. & G. had the sheriff levy on the life estate of Mr. Pope in certain lands and the property was being advertised for sale in September, 1941; furthermore U. S. F. & G. garnished a third party in June, 1941, and the third party admitted an indebtedness of $622.77 to Mr. Pope and the third party paid the indebtedness into court. Mr. Pope was on duty as a lieutenant-colonel in South Carolina and he asked for a suspension and abatement of the proceedings while he was in the military service. The lower court granted a thirty-day stay. Subsequently U. S. F. & G. readvertised the property for sale and Mr. Pope again filed his motion for a further stay which the lower court denied and on appeal to the Court of Appeals of Georgia, this action was affirmed.

The *Pope* case dealt with a *judgment* rendered seven years before the U. S. F. & G. started the proceedings in the

case. Colonel Pope did not file any affidavit showing that his ability to *pay* was materially affected by his military service. In fact, U. S. F. & G. filed a lengthy affidavit showing among other things the lack of good faith in the case and in addition the earnings of Colonel Pope. In other words, U. S. F. & G. introduced a verified answer to the effect that Colonel Pope could comply with the judgment (See opinion at 20 S. E. (2d) 620).

We submit that much of the language used by Judge Sutton in discussing the Soldiers' and Sailors' Civil Relief Act if removed from the context and frame of the opinion could be criticized. Suffice it to say, however, at this point, that the Georgia Court had before it evidence demonstrating an ability to pay an old judgment procured before Colonel Pope had entered on active duty while the case at bar has no evidence whatsoever that petitioner's ability to defend has not been materially affected by his military service.

But compare *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb. 1942) with the *Pope* case.

(2) *Jamaica Sav. Bank* v. *Bryan, et al.*, 175 Misc. 978, 25 N. Y. S. (2d) 17 (1941).

Plaintiff bank sought to foreclose a mortgage and named several defendants including the owner and her husband who claimed he was a soldier. Husband and wife asked the court to stay the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. The court felt it needed and asked for proof on the point that the ability of the defendant to conduct his defense is not materially affected by reason of his military service. That is all the case stands for because the court felt that the "soldier"-defendant was liable on the bond with his wife, the owner of the property.

The case was brought up later for determination in *Jamaica Sav. Bank* v. *Bryan, et al.*, 25 N. Y. S. (2d) 641 (1941), which fact is not brought out in the opinion of the North Carolina Supreme Court in the case at bar. The New York Court then pointed out that the "soldier"-

husband was not liable on the bond and was a nominal defendant because of occupancy. Furthermore, he really was only in the National Guard and his military duties did not require his full time. The court concluded that the Soldiers' and Sailors' Civil Relief Act of 1940 was not applicable.

Need petitioner say anything further about the *Jamaica* case cited by the Supreme Court of North Carolina?

The attitude of the North Carolina courts to the relief provided by the Soldiers' and Sailors' Civil Relief Act can be gleaned not only from the case at bar, but also from a later case—*Batts* v. *Little*, 222 N. C. 353, 23 S. E. (2d) 41 (1942). The defendant in *Batts* v. *Little* was a sergeant in the United States Army; he was sued for damages for injuries caused by alleged negligence in the operation of an automobile; he denied the allegations in his answer. The defendant was transferred from a North Carolina camp to an unknown destination and when the cause came up for trial a verified application for relief under the Soldiers' and Sailors' Civil Relief Act was filed. The trial judge made the following order:

> "The above entitled causes having come on for trial at this term, and the plaintiffs having insisted upon a trial, and it appearing to the Court that the defendant is a Sergeant in the United States Army, and that his present whereabouts is unknown, and it further appearing to the Court that his presence in Court at any time in the future is exceedingly questionable, and it also appearing to the Court that the defendant is represented in the above causes by Messrs. Carr, James & Carr, Attorneys of the City of Wilmington, and the Court finding as a fact that these causes ought to be tried, and that there is no valid reason why the same should not be tried:"
>
> "It is now, upon motion of the plaintiffs, ordered and adjudged that the said causes be consolidated for the purpose of trial, and that they be set for hearing on Monday, November 2, 1942, and any motion made by the defendant for a continuance is disallowed."

"It is suggested by the Court that the whereabouts of the defendant be ascertained from the Commanding Officer at Camp Davis, and that his deposition be taken, if the defendant shall require such deposition, and the plaintiffs, in open Court, waive all formalities as to the taking of the said deposition."

* * *

The Supreme Court of North Carolina dismissed the appeal without prejudice to renew the motion and on technical grounds. The reason for our calling this case to the attention of this Court is to demonstrate that the North Carolina courts do not place a true construction on the Soldiers' and Sailors' Civil Relief Act of 1940 and honor the Act in the breach.

## V.

### Other Pertinent Cases on the Act.

In *Lanham, et al.* v. *Cline,* 44 F. Supp. 897 (D. Idaho 1942), plaintiffs sued A and B for damages arising out of an automobile collision. Plaintiffs stated that they would seek relief only against A as B was in the armed forces and had requested the relief provided by the Soldiers' and Sailors' Civil Relief Act. The Court stayed the proceedings in the case even as against A, who was not in the military forces. But in *Swiderski* v. *Moodenbaugh,* 44 F. Supp. 687 (D. Oregon, 1942) an action was brought against a soldier for injuries sustained by plaintiff in a collision with a car driven by defendant-soldier. The action was brought when defendant was out of the service and he attended the pretrial conferences and his deposition was taken as an adverse witness while he was on inactive duty (to all practical purposes a civilian). The trial was delayed, but the case was finally called for trial when the defendant was back on active duty. Plaintiff agreed to limit his recovery to the casualty insurance policy carried by defendant and further not to seek a personal judgment against defendant. The

court, thereupon, allowed the trial to proceed and denied the motion of defendant for a postponement of further action.

See *Korsch* v. *Lambing*, 28 N. Y. S. (2d) 167 (1941) where the stay was granted because defendant was in the service and was a necessary witness to the defense. See also Annotations in 130 A. L. R. 774, 137 A. L. R. 451, 140 A. L. R. 1509, 141 A. L. R. 1515, 142 A. L. R. 1514.

In *Bowsman* v. *Peterson*, 45 F. Supp. 741 (D. Neb., 1942) the court said in granting a motion to stay the proceedings stated at p. 743:

> "But here the statute seems to be imperatively controlling both as to the necessity for the stay, 50 U. S. C. A. Appendix § 521, and for practical purposes, as to its duration, 50 U. S. C. A. Appendix § 524. By Sec. 524, it is provided that 'Any stay of any action * * * ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period * * *'. It is true that the language is permissive. But it is likewise obvious that it reflects an instructive legislative policy to place the person engaged in the military establishment beyond the effect of the urgencies and uncertainties of pending litigation, and to allow him a reasonable period following his discharge to reorient himself with a view to the trial of his cause. So, if a continuance is in order, there would seem to be a rather clear congressional intimation that in the ordinary case it should be granted in general terms for the duration of the applicant's service and three months thereafter.' It is presently impracticable to attempt to limit stays, except in extraordinary cases, to 'any part of such period.'
>
> "Section 521 deals with the conditions under which a stay of proceedings will be allowed. It provides that: 'At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its

own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.'

"In this case the defendant has applied for a stay of proceedings. He has, therefore, removed the question of allowing a stay from the field of the court's discretion (if, indeed, it be considered that, circumstances suggesting a stay being available, there is ever any real discretion to deny a stay) and made the allowance of a stay mandatory, 'unless, in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service.' That language of the Act appears to the court to impose upon the party resisting the application for stay the burden of satisfying the court of the absence of material impairment by military service of the defendant's ability to defend himself.

"No attempt has been made here towards such a showing; and the court can not readily comprehend how such attempt could ordinarily be successful, or the showing made in furtherance thereof persuasive.

The Soldiers' and Sailors' Civil Relief Act of 1940 (in like manner with all similar previous acts in our history) was prompted by at least two considerations, first, the maintenance in the armed forces of a reasonable measure of that unbothered serenity and security in respect of personal responsibilities which effectively promotes military efficiency and the national defense; and secondly, the assurance that in the field of individual justice no advantage in judicial proceedings by or against a soldier or sailor will result from his absorption in his country's defense.

The soldier or sailor in seasons of war has neither time nor mental aptitude for litigation. Without unnecessary discussion, it may simply be stated that while the Act recognizes that in some instances 'the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service,' such instances will be relatively rare. And the court is not made aware of any circumstances

upon which it may be concluded that this is one of them.

There is nothing novel either in the legislation which the defendant now invokes, or in the policy of the judicial and social indulgence towards the absent soldier. Only presumption would impel a judge, in a memorandum of this character, to assemble from legal and general literature the abundant examples of the latter grace. And as to the former, it will be sufficient merely to mention the numerous statutes enacted during the Civil War upon the point (vide: 13 C. J. 143, Title, Continuances Sec. 42(2), Note 68 and cases cited; 17 C. J. S., Continuances, § 30) and the more recent Soldiers' and Sailors' Civil Relief Act of 1918, 50 U. S. C. A., Appendix § 101, *et seq.*, especially Secs. 112 and 115. It may be granted that a continuance will probably operate at least temporarily and perhaps permanently to the disadvantage of the plaintiff. That result is unfortunate. But it is a reasonable exaction by society from one of its members for its own preservation; a proper imposition by the state upon an individual citizen in the course of its discharge of its constitutional obligation to 'provide for the common defense.'"

## VI.

### Denial of Due Process.

Independent of statute, as an incident to their authority to hear and determine causes, courts may grant continuances on a basis of sound discretion. Mr. Justice Day in *Franklin* v. *South Carolina*, 218 U. S. 161, at page 168, points out that the action is not ordinarily reviewable and that "it would take an extreme case to make the action of the trial court in such a case a denial of due process of law."

We submit that the facts in the case at bar are the extreme case and thus make the refusal to grant a continuance by the trial court a denial of due process of law within the words of Mr. Justice Day.

Without referring to the 1942 amendments to the Soldiers'

and Sailors' Civil Relief Act of 1940, which clearly confers the benefits of the Act upon United States citizens serving with our Allies, the Supreme Court of Ohio in *State ex rel. Buck* v. *McCabe, et al.*, 140 Ohio St. 535, 45 N. E. (2d) 763, sustained a continuance of a case brought against a defendant in the military service of the Dominion of Canada. Plaintiff contended that the trial court abused its discretion in granting the continuance to the absent defendant and the Ohio court determined that such was not the case. How much more should we protect members of our own armed forces.

The basis for a continuance of an action rests upon the right of a party to have a reasonable opportunity to be present and to be heard at the trial of his cause upon the merits. True, the absence of the party must be unavoidable and not voluntary. One subject to military orders does not have the freedom to come and go as he pleases, nor does he have the free opportunity of taking annual leave on a leave slip nor does he "dare" take the risk of being absent from duty on the flimsy excuse of a "headache". "His service is continuous day and night; his movements are governed by orders and commands, by military law * * *" is stated in *Jones* v. *United States*, 60 Ct. Cls. 552 (1925) as reasons for concluding that amounts received as commutation of quarters are to be excluded from gross income.

The trial court on the evidence before it in this case was arbitrary and capricious in refusing to grant the continuance to the petitioner and even if there were no Soldiers' and Sailors' Civil Relief Act, petitioner should have been granted a continuance.

## VII.

### Petitioner Entitled To Day In Court.

It is clear that a reversal of the state court by this Court will not affect any of the rights of the plaintiffs in the lower court. The bona fides of the petitioner is clearly demonstrated by his deposit of the subject matter of the "trust" in litigation with the Clerk of the trial court, and no loss can result to plaintiffs from this aspect (R. 45). The day of reckoning for the parties is merely delayed and at some future time both sides will have a day in court. Up to this time petitioner has not had an opportunity for his day in court because of his active military service. In the words of Judge Schmuck in *McGlynn* v. *McGlynn*, 35 N. Y. S. (2d) 6, at page 7, "every inhibition must be deferred so that he is physically, mentally and spiritually free to devote himself to the greatest task ever to confront him and his country".

We ask this Court only for the right to have a day in court.

## CONCLUSION.

An army officer on active military duty and entitled to the relief of the Soldiers' and Sailors' Civil Relief Act of 1940 is denied a continuance of a case in which he is the defendant. The trial court summarily concludes that the army officer's ability to defend is not materially affected by such military service and proceeds to grant a personal judgment against such army officer despite the fact that (1) local counsel for the army officer cannot participate in the trial because he, too, has reported for active military duty just twelve days before the trial, (2) the army officer is several hundred miles away and cannot get leave except in serious emergencies, (3) affidavits are submitted by such army officer and his local counsel and a

request for a continuance is made, (4) no proof is submitted by anybody that such army officer can conduct his defense and that his ability is not materially affected by military service, (5) such army officer has a defense to the serious and personal charges made against him, and (6) a substantial sum of money is involved.

The relief afforded by the Soldiers' and Sailors' Civil Relief Act should not be so lightly brushed aside by any court. Our country is at war and the morale of the members of the armed forces must be sustained. That is part of the battle on the home front. Yet the North Carolina courts, in this case, have paid homage to the act by merely noting its provisions. There is not a scintilla of evidence in the record to justify the treatment accorded petitioner in the state courts.

It is petitioner's contention that the statutory continuance allowed him by the Act placed the burden of proving his ability to defend was not materially affected by his military service squarely on those who opposed the continuance. No evidence was submitted by the other side. Perhaps it was unnecessary because the trial judge seems to have moved on his own initiative. Such treatment to a soldier of the United States by state courts will not be allowed, we trust, so long as this Court sits.

We submit that a failure to reverse the state courts will place this Court's stamp of approval on the treatment accorded petitioner which will have deleterious effects on the morale of the members of our armed forces. Such adverse news will spread throughout the entire Army and Navy here and abroad and will create a disturbance of mind in the men away from home that they are not secure in their rights and property.

The Soldiers' and Sailors' Civil Relief Act cannot be frittered away so easily by mere words of a trial judge.

We submit that the Court should reverse the state courts and give full effect to the Act passed by the Congress as

part of its war legislative program to end that justice may be done directly to a member of the armed forces and indirectly to the millions of men and women who are fighting on every front.

Respectfully submitted.

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# APPENDIX.

## Pertinent Provisions of the Soldiers' and Sailors' Civil Relief Act of 1940.

54 STAT. 1178

Section 101. ---

"(1) The term 'persons in military service' and the term 'persons in the military service of the United States,' as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term 'military service,' as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause."

* * * * * * * * * *

"(3) The term 'person,' when used in this Act with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association."

* * * * * * * * * *

"(4) The term 'court,' as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record."

* * * * * * * * * *

Section 200. * * *

"(3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized at-

torney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts."

• • • • • • • • • •

Section 201.

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

• • • • • • • • • •

Section 205.

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."